Circuit Court for Prince George's County
Case No. CT170940X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 604

September Term, 2018

MAURICE MERCER

v.

STATE OF MARYLAND

Graeff,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 7, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Prince George's County convicted Maurice Mercer, appellant, of second-degree assault, use of a firearm in the commission of a felony or crime of violence, and related weapons offenses. On appeal, Mr. Mercer presents two questions for our review:

1. Did the court commit reversible error in overruling defense counsel's objection to the victim's testimony that she gave the 911 operator a false name "because I know the things that Mr. Mercer is capable of"?

2. Did the court commit plain error in accepting inconsistent verdicts?

For the following reasons, we affirm the judgments of the circuit court.

On December 16, 2017, Tyesha Manley confronted Mr. Mercer, who was seated in the front passenger seat of a vehicle, and asked him why he had attacked her brother. Mr. Mercer told her she "better get away from the car and get out of his face." When Ms. Manley did not move, Mr. Mercer pointed a gun at her through the open car window and said: "You better not call the police. I know you're going to snitch."

Ms. Manley walked away and called 911, using a false name. Her unsolicited explanation for doing so elicited a general objection from defense counsel, which the court overruled:

> [PROSECUTOR]: Now when you talked to the 9-1-1 people, did you identify yourself?
>
> [Ms. Manley]: Yes.
>
> [PROSECUTOR]: How did you identify yourself?
>
> [MS. MANLEY]: I told them that my name was Kim, because I was afraid to give out my real name.
>
> [PROSECUTOR]: Did there come - -

[MS. MANLEY]: Because . . .

[PROSECUTOR]: I'm sorry.

[MS. MANLEY]: I was afraid to give out my real name because I know the things that Mr. Mercer is capable of.

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Overruled.

Mr. Mercer contends that Ms. Manley's testimony that she knew what Mr. Mercer "is capable of" was not relevant because "[i]t does not make whether [he] pointed a gun at her any more or less likely," and it constituted inadmissible prior bad acts evidence. We disagree.

"Evidence is relevant if it tends to 'make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.'" *Walter v. State*, 239 Md. App. 168, 198 (2018) (quoting Maryland Rule 5-401). A ruling that evidence is relevant is reviewed de novo. *Id.*

Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. "Probative value is outweighed by the danger of 'unfair' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Newman v. State*, 236 Md. App. 533, 550 (2018) (quoting Joseph F. Murphy, Jr., Maryland Evidence Handbook, (3d ed., 1999), p. 181). The "balancing between probative value and unfair prejudice is something that is entrusted to the wide

discretion of the trial judge." *Id.* at 556 (quoting *Oesby v. State*, 142 Md. App. 144, 167-68 (2002)).

Here, the jury was instructed on the "intent to frighten" modality of second-degree assault, which requires the State to prove that: (1) the defendant committed an act with intent to place another in fear of immediate physical harm; (2) the defendant had the apparent ability to bring about the harm; and (3) the victim was aware of the impending battery. *Snyder v. State*, 210 Md. App. 370, 382 (2013). Apparent ability to bring about harm is considered "from the viewpoint of the threatened victim." *Thompson v. State*, 229 Md. 385, 414 (2016). The evidence that Ms. Manley feared Mr. Mercer because she knew what he "was capable of" was relevant to the jury's determination of whether, from Ms. Manley's viewpoint, Mr. Mercer had the ability to cause harm when he pointed the gun at her. Moreover, the probative value of the statement was not outweighed by danger of unfair prejudice such that the court abused its discretion in admitting it. *See, e.g., Newman*, 236 Md. App. at 549 (Maryland Rule 5-403 requires "that the weighing produce a 'substantial' tilt toward 'unfair prejudice' in order to justify inadmissibility.")

Furthermore, we are not persuaded that the unsolicited statement, "I know the things that Mr. Mercer is capable of," necessarily implied that he had committed "other crimes" or "bad acts," which are inadmissible under Maryland Rule 5-404(b), subject to exception. The vague statement could have been interpreted by the jury as a reference to Mr. Mercer's alleged assault upon Ms. Manley's brother, which Ms. Manley had already testified to, without objection.

In addition to the charges that resulted in his convictions, Mr. Mercer was charged with first-degree assault, and the jury acquitted him of that charge. Mr. Mercer concedes that he did not lodge a timely objection to the verdicts at trial, but asserts that the verdicts are legally inconsistent, and requests that we exercise our discretion to review the court's acceptance of the verdicts for plain error.

Even if we were to agree that the verdicts were legally inconsistent, we decline to exercise plain error review. As the Court of Appeals has observed, "the rule against legally inconsistent verdicts is intended to protect the criminal defendant" and, therefore, "[t]he choice of whether to object to inconsistent verdicts belongs to the defendant alone." *Givens v. State*, 449 Md. 433, 476 (2016) (citation omitted). When a jury returns inconsistent verdicts of conviction and acquittal, "[t]he verdict of acquittal is frequently returned in the interest of lenity and actually is a windfall for the defendant." *Travis v. State*, 218 Md. App. 410, 452 (2014). The trial court "may not, *sua sponte*, send the jury back to resolve the inconsistency, because it is the defendant who is entitled, should he [or she] so wish, to accept the benefit of the inconsistent acquittal." *Givens*, 449 Md. at 460 (quoting *Tate v. State*, 182 Md. App. 114, 135 (2008)).

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.